UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 92-18-P-H***
	)	***(Civil No. 95-252-P-H)***
PEDRO ARISMENDY OLIVIER-DIAZ,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Pedro Arismendy Olivier-Diaz ("Arismendy") moves this court to vacate his sentence pursuant to 28 U.S.C. § 2255. Arismendy was convicted, after a jury trial, of conspiracy to possess cocaine with intent to distribute under 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 846, and distribution and aiding and abetting the distribution of cocaine under 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2. He asserts a denial of effective assistance of counsel, based on trial counsel's failure to communicate with him through an interpreter before trial and his inadequate examination of witnesses.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation omitted). Because I find Arismendy's allegations to be either conclusory or insufficient to justify relief if true, I conclude that no hearing is necessary and recommend that his motion be denied

without a hearing.[1]

I. Background

During the fall of 1990, Arismendy met drug dealer Ramon Verona and offered to sell him cocaine. *United States v. Olivier-Diaz*, 13 F.3d 1, 2 (1st Cir. 1993). Verona initially declined, but Arismendy later persuaded Verona and an unidentified woman to make several trips from New York to Massachusetts to transport cocaine to a confederate of Arismendy. *Id.* at 1-2. For each trip, Verona was paid $500 and supplied with 125 grams of cocaine on credit. *Id.* at 2. Verona used this cocaine to supply three of his customers in Maine, Peter Lauzier, Vicki Hall and Pauline Rivard. *Id.* As of May 1991, Rivard owed Verona approximately $16,000 for "fronted" cocaine, $4,000 of which was owed to Arismendy. *Id*. Arismendy recruited Verona's "paramour," Argentina Dalmassi, and three men to travel with him to Maine to collect the debt. *Id.* On June 2, 1991 they arrived at Rivard's home. *Id.* Upon learning from her boyfriend, Robert Pelletier, that she was not home, they ransacked the house, taking cash and jewelry. *Id.* Arismendy proposed that he take possession of Pelletier's boat and provide him with cocaine to sell until he paid back what Rivard owed. *Id.* Later that day, Arismendy found Rivard and demanded payment. *Id.* Rivard promised to pay him the next day, though she believed she owed the money only to Verona. *Id.* Moments later, Dalmassi appeared, slapped Rivard and demanded payment; Arismendy, however, ordered Dalmassi to leave. *Id.* Arismendy and the others were arrested on charges related to the collection attempt, but were

[1] I reject the government's argument that the motion should be dismissed for failure to supply a memorandum of law as required by Local Rule 19(a). The absence of a memorandum of law has neither prejudiced the government nor burdened the court, because the attachment to the motion sufficiently explains its basis. Moreover, the interests of justice require adjudication of the motion on its merits.

released on bail later that day. *Id.* Rivard, fearing for her safety upon hearing of their release, went to the authorities and offered to cooperate. *Id.*

In July 1991 Arismendy began distributing cocaine directly to Lauzier and Hall. *Id.* For the next several months he supplied them with two to ten ounces of cocaine every other week. *Id.* In early October 1991, Lauzier and Hall stopped en route to a cocaine transaction and weighed the cocaine in the presence of Arismendy and their friend Elwin Baker. *Id.* Upon making the sale they were immediately arrested because the "customer" was an undercover officer of the Maine Bureau of Intergovernmental Drug Enforcement. *Id.* Arismendy later placed Baker in charge of Lauzier's and Hall's business and sold him as much as eight ounces of cocaine at a time. *Id.* Arismendy was arrested in January 1992. *Id.*

Arismendy is Hispanic and claims to speak virtually no English. Motion Under 28 USC § 2255 ("Motion") (Docket No. 24) ¶ 12. His trial counsel spoke no Spanish and did not utilize an interpreter when meeting with him prior to trial. *Id.* Other than during pretrial court appearances, Arismendy and his trial counsel met only once before trial, on which occasion Arismendy states that he and counsel did not have meaningful communications. *Id.* An interpreter was present during trial to translate the proceedings for Arismendy. Transcript of Jury Trial, *United States v. Pedro Arismendy-Olivier*, Crim. No. 92-18-P-H ("Trans.") at 4.

Counsel's opening statement focused on the credibility of the government's witnesses, cocaine traffickers and users who had a motive to testify favorably to the prosecution. Trans. at 21-24. Among the issues raised in counsel's cross-examination of seven witnesses involved in the charged conspiracy, Verona, Jose Gonzalez, Rivard, Pelletier, Hall, Lauzier and Baker, were their motive to assist the prosecution, their cocaine trafficking and use, and attempts to coordinate their

testimony. Trans. at 128-29, 162-63, 164-66, 195-98, 211, 215, 217-18, 221, 246-47, 260-61, 289-90, 295, 303, 351-52, 355-56, 364-65, 372-73, 452-57, 464, 469-70, 517, 533, 536.

On several occasions, out of the hearing of the jury, the court questioned the scope of counsel's cross-examination and suggested that counsel might be losing the jury's attention. Trans. at 117, 138. During counsel's cross-examination of Hall, the court called a recess during which the following exchange took place:

> THE COURT: Counsel, this is painful, this is going on and on and on and on. . . . [W]e're just emphasizing and reemphasizing everything that took place with respect to the transactions here at issue.
>
> I do not understand the focus of the cross-examination, [counsel], you seem to be simply confirming over and over again the government's version of the offenses. And we go to painful, painful lengths on everything that was said on each day on amounts and dollars which is hard for me to see has any bearing on your client's defense. The jury I can tell from their facial expressions if you're not looking at them are fed up.
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> [COUNSEL]: Your Honor, I don't agree with that. You must understand that my client believes that all of these witnesses are liars, telling untruths. And I have nothing else to do but to question them about the details because it's very easy for the government to put them on after they've been given immunity, or after they've been given special deals, and have them tell the story as the government wants to have it told. . . .
>
> Now I don't believe that the jury is fed up. I believe the jury will see that this testimony is contrived, made up, and they're liars, and inconsistent, and making statements that are self-serving, and in some cases to belittle or make small their participation in these things, and any number of ways which will affect their credibility.
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> . . .
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> . . . I have no other alternative but to try to pick apart what these people say to try to demonstrate that they're inconsistent, each with the other, and inconsistent internally between what they said on direct examination and cross-examination. And I may be successful in some of these efforts, and I may be unsuccessful in some of these efforts, but I certainly have to try. And if it's a bit time-consuming, I apologize to the court, there's no other way that I can do it, except to do it that way.
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> THE COURT: Counsel, it's not the time-consuming issue, it's the extent of the record. . . . [I]t's not the question of picking apart a story on the material details, but it's on the insignificant details that we go over and over again to no end.

Id. at 381-83.

In his closing argument, counsel focused on the topics covered in his cross-examination of the conspirators: motive to assist the prosecution, *id.* at 691-93, 697-701, 704, 706-07; cocaine trafficking and use, *id.* at 694, 698, 701, 703, 706-07; and coordination of their testimony, *id.* at 699-700. He further argued that there were inconsistencies in their testimony, *id.* at 700-01, 703, and noted Verona's inability to recall certain details, *id.* at 694-96. After nearly three hours of deliberations, the jury found Arismendy guilty of conspiracy to distribute cocaine or possess cocaine with the intent to distribute it, and of distributing or aiding and abetting the distribution of cocaine. *Id.* at 715.

II. Ineffective Assistance of Counsel

To prevail on his ineffective-assistance-of-counsel claim, Arismendy must satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that counsel's performance was constitutionally deficient, *i.e.*, that it fell below an objective standard of reasonableness. *Matthews v. Rakiey*, 54 F.3d 908, 916 (1st Cir. 1995) (citing *Strickland*, 466 U.S. at 687-88). In doing so, he "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Arismendy must also prove that counsel's deficient performance likely prejudiced his defense. *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Arismendy argues that he was denied effective assistance of counsel because he had no

meaningful pretrial communications with counsel, and because counsel's examination of witnesses served to confirm, rather than refute, the prosecution's case.

A. Pretrial Communications

Arismendy claims that counsel's failure to meet with him before trial with an interpreter deprived him of his right to participate in and aid in his defense. The government argues that Arismendy may speak sufficient English to have meaningful communications with counsel absent an interpreter, and that the interpreter-assisted meetings during trial were constitutionally sufficient. I need not decide whether this alleged failure was constitutionally deficient because Arismendy has not shown that it prejudiced his defense.

The theory that counsel outlined in his opening statement remained consistent throughout the trial, despite several interpreter-assisted meetings with Arismendy, *see* Trans. at 222-23, 243. This belies any inference that Arismendy had information which, if communicated to counsel before trial, would have improved his defense strategy. Indeed, when the trial court questioned counsel's cross-examination strategy, counsel explained that it was based on Arismendy's insistence that the witnesses were lying. Accordingly, Arismendy's allegations do not demonstrate a reasonable probability that meaningful pretrial communications would have changed the result of the trial.

B. Examination of Witnesses

Arismendy's vague assertion that counsel was "not adequately prepared" lacks the requisite specificity to support an ineffective assistance of counsel claim. *See Barrett v. United States*, 965 F.2d 1184, 1186 (1st Cir. 1992) (summary dismissal appropriate if grounds for relief "amount to

'bald' assertions without sufficiently particular and supportive allegations of fact"). Arismendy also argues that counsel's "examination of witnesses supported the prosecutions' [sic] case, instead of refuting it." Motion ¶ 12. While this claim constitutes a "sufficiently particular and supportive allegation[] of fact,"[2] *Barrett*, 965 F.2d at 1186, I nonetheless find that the conduct alleged does not constitute ineffective assistance of counsel.

The trial court observed that counsel seemed to be "confirming over and over again the government's version of the offenses." Yet, as counsel explained, part of his strategy was to demonstrate that the witnesses were lying by eliciting inconsistencies, both within each witness's story and from the testimony of all the witnesses. Counsel previewed this strategy to the jury in his opening statement and carried it through to his closing argument.

Not all of counsel's questions were artfully asked, and many were tangentially relevant at best. Yet, "the Constitution does not guarantee a defendant a letter-perfect defense or a successful defense; rather the performance standard is that of reasonably effective assistance under the circumstances then obtaining." *United States v. Natanel*, 938 F.2d 302, 309-10 (1st Cir. 1991). The questions were part of a calculated strategy necessitated, as counsel explained, by Arismendy's claim that the witnesses were lying. Although the strategy was not ideally executed, Arismendy's allegations do not overcome the presumption that the examination constituted sound trial strategy.

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[2] Arismendy's reference to the exchange between the trial court and counsel provides a workable, albeit vague, context for his ineffective-assistance-of-counsel claim. That exchange concerned the manner in which counsel cross-examined the witnesses who testified to the cocaine transactions at issue. *See* Trans. at 381-83. Accordingly, I understand Arismendy to argue that counsel improperly cross-examined the conspirators by eliciting testimony supporting the prosecution's case. Absent such a context, *i.e.*, if the claim were simply that counsel's examination of every witness was inadequate, the claim would be dismissed for lack of sufficiently particular factual allegations. *See Barrett*, 965 F.2d at 1186.

Even assuming that counsel's examination was constitutionally deficient, Arismendy has supplied absolutely no evidence that the deficiencies prejudiced his defense. He has not even speculated as to how the witnesses would have testified if cross-examined more skillfully. In essence, Arismendy's complaint is that counsel elicited testimony that the jury had already heard. I find no reasonable probability that, but for the alleged deficiencies, the result of the trial would have been different.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate his sentence be ***DENIED*** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 24th day of January, 1996.

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David M. Cohen
United States Magistrate Judge